

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 8, 2010 Session

**SARAH ANN JOHNSON, FOR HERSELF AND ON BEHALF OF THE
LATE CECIL JOHNSON v. DR. BRUCE LEVY ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 09-2339-IV Russell Perkins, Chancellor**

No. M2009-02596-COA-R3-CV - Filed January 14, 2010

The matters at issue pertain to Cecil C. Johnson, a condemned prisoner who was executed by the State of Tennessee on December 2, 2009, the decision of the Medical Examiner of Davidson County, Tennessee to perform a post-mortem autopsy on Mr. Johnson, and the objection to an autopsy based upon the religious beliefs of Mr. Johnson. The authority of the County Medical Examiner to perform an autopsy on Mr. Johnson, an executed prisoner, arises from the Post-Mortem Examination Act, Tennessee Code Annotated § 38-7-106. The Post-Mortem Act expressly authorizes the Medical Examiner to perform an autopsy of a prisoner executed in Davidson County, Tennessee. Sarah Ann Johnson opposes an autopsy based upon rights afforded under Tennessee's newly enacted "Preservation of Religious Freedom" statute, Tennessee Code Annotated § 4-1-407(c)(1) & (2). Tennessee's religious freedom statute states "[n]o government entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is: (1) Essential to further a compelling governmental interest; and (2) The least restrictive means of furthering that compelling governmental interest." We have determined that the Davidson County Medical Examiner may have a compelling governmental interest in performing autopsies of executed prisoners; however, the Medical Examiner has failed to establish by clear and convincing evidence under the specific facts of this case that performing an autopsy on Mr. Johnson is essential to furthering the articulated interest. We therefore affirm the decision of the Chancery Court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Pamela S. Lorch, Senior Counsel, for the appellant, State of Tennessee.

Sue B. Cain, Director of Law, Lora Barkenbus Fox and Jeff Campbell, for the appellant, Metropolitan Government of Nashville and Davidson County, Tennessee.

William Hubbard and William Farmer, Nashville, Tennessee, for the appellee, Sarah Ann Johnson.

OPINION

This action was filed in the Chancery Court of Davidson County by Mrs. Sarah Ann Johnson, for herself and on behalf of her deceased husband, Cecil C. Johnson, to prevent the Medical Examiner from performing an autopsy on Cecil Johnson and to order him to immediately release his body to her so that he could be buried.¹ On December 16, 2009, the Chancellor ordered the Medical Examiner, Dr. Bruce Levy, not to perform an autopsy on Cecil Johnson and to turn the body of Mr. Johnson over to the plaintiff, Sarah Ann Johnson, by 4:00 p.m. on December 18, 2009.

Immediately thereafter, on December 17, 2009, Dr. Levy, the Davidson County Medical Examiner, filed a Tenn. R. App. P. 7 motion for an emergency stay of the ruling of the Chancery Court pending appeal of the underlying issues and for an expedited hearing.² Pursuant to an Opinion and Order entered on December 18, 2009, this court granted the stay

¹In order to provide a more complete picture of the proceedings leading up to this appeal, it is important to note that the action in the Davidson County Chancery Court was preceded by a related action commenced in the United States District Court of Middle Tennessee on December 1, 2009 by Mrs. Johnson and her husband, Cecil Johnson, who was alive when the action was filed but was executed five hours later. The U. S. District Court initially restrained the Medical Examiner from performing the autopsy on Mr. Johnson pending a hearing. *See Cecil Johnson, et ux. v. Dr. Bruce Levy, et al.*, No. 3:09-1139, 2009 WL 4723401 (M. D. Tenn. Dec. 11, 2009). The temporary restraining order was dissolved following a hearing; thus, the Medical Examiner was authorized to perform the autopsy on Mr. Johnson but for the immediate commencement of this action. The district court's ruling appears in a Memorandum Opinion that is not available on line. *See Cecil Johnson, et ux. v. Dr. Bruce Levy, et al.*, No. 3:09-1139 (M. D. Tenn. Dec. 17, 2009). It was that decision that prompted Mrs. Johnson to commence this action.

²Rule 7 requires that relief be first sought at the trial court under Tenn. R. Civ. P. 62. Pursuant to Rule 62, the defendant orally moved the Davidson County Chancery Court to stay its order that the defendant turn over the body of Cecil Johnson to the plaintiff, his widow, on or before 4:00 p.m., Friday, December 18, 2009. The grounds for the motion were that the release of the body would change what Defendant described as "the status quo" and prejudice the defendant. The Chancellor denied the motion on December 17, 2009.

and set a very expedited schedule for this appeal.³ The parties timely filed their respective briefs and oral argument was heard on January 8, 2010.

The plaintiff, Sarah Ann Johnson, contends an autopsy would violate her husband's religious beliefs and his right to the free exercise of religion, and argues that the Medical Examiner has failed to establish pursuant to Tenn. Code Ann. § 4-1-407(b) & (c) that performing an autopsy on Mr. Johnson is essential to further a compelling government interest. The Chancellor ruled in favor of Mrs. Johnson, finding that Mr. Johnson had a sincere religious view that an autopsy would desecrate his body and that the performance of an autopsy on Mr. Johnson would substantially burden the free exercise of his religion. The Chancellor made several findings of fact including the following:

1. When the State of Tennessee executed Mr. Johnson, he was 53 years old. Shortly before his execution, he appeared to be in good health and/or excellent condition.
2. During the 72-hour period that Mr. Johnson was on death watch, he seemed fine, with no reported concerns about his health.
3. Mr. Johnson executed a will on November 30, 2009 that designated Plaintiff as his personal representative.
4. On December 1, 2009, Mr. Johnson executed a sworn notice objecting to his body being autopsied and reciting his religious view that an autopsy would desecrate his body.
5. Additionally, Mr. Johnson's pastor signed a sworn statement on December 1, 2009, confirming the genuineness of Mr. Johnson's religious view that an autopsy would amount to desecrating his body.
6. Plaintiff also made a sworn statement reciting her view that an autopsy would desecrate Mr. Johnson's body.
7. When Mr. Johnson was administered the three injections under Tennessee's lethal injection protocols, he reacted as anticipated upon external observation and died as expected.
8. It has been two weeks since Mr. Johnson died. An autopsy may not yield as accurate of results now as it would have within a day or so of his death.

Following a legal analysis, the Chancellor made further findings in narrative form and stated his conclusions:

³Other relevant facts and procedural history of this matter were set forth in the December 18, 2009 Opinion and Order. Because that document is only available in the Office of the Appellate Clerk in Nashville, we are restating some of the relevant facts and procedural history here.

It is undisputed that Plaintiff has, and Mr. Johnson had, a genuine belief that an autopsy would desecrate Mr. Johnson's body in violation of their religious beliefs. Consequently, Defendant's intention to perform an autopsy on Mr. Johnson's body has to be viewed in light of the factual record and this Court's analysis of Tenn. Code Ann. §§ 38-7-106 & 4-1-407.

Dr. Levy testified credibly and forthrightly that an autopsy was needed to determine, within a reasonable degree of medical certainty, the actual, medical cause of Mr. Johnson's death and whether the State's lethal injection protocol was followed. Dr. Levy also testified that in his view, a prisoner's death by execution is "homicide" or an "unnatural death." Under the current state of Tennessee law, execution of an inmate probably does not amount to homicide. It may, however, be an "unnatural" death. In any event, it is undisputed that the medical examiner's statute permits the county medical examiner to conduct autopsies on "executed prisoners." Tenn. Code Ann. § 38-7-106(a).

. . . Under Tenn. Code Ann. § 38-7-106(a), the county medical examiner is directed to give notice of the proposed autopsy to the decedent's next of kin using service of process. . . . The statute's notice requirement, however, suggests that the county medical examiner's discretion to perform autopsies is subject to limitations and oversight.

Tenn. Code Ann. § 4-1-407 contemplates that a court will review these claims on a case-by-case basis to determine whether cognizable religious beliefs are at issue. In the face of a challenge to whether a county medical examiner will be permitted to perform an autopsy under the statute, Tenn. Code Ann. § 38-7-106(a) contemplates a case-by-case determination, as reflected in the notice provisions and the use of the word "may" in the statute. Here, the Court concludes that Defendant's interest in conducting Mr. Johnson's autopsy is a legitimate state interest, but it is not a compelling state interest that has been demonstrated by clear and convincing evidence. This conclusion is supported by the fact that Mr. Johnson died two weeks ago on December 2, 2009, making the efficacy of an autopsy at this time questionable and by the fact that it appears clear that Mr. Johnson died from the three lethal injections administered to him by the State of Tennessee. Given Ms. Johnson's waiver of any challenge to the procedures used in Mr. Johnson's execution, there is nothing to investigate that would trump Plaintiff's free exercise of her religious beliefs.

The Court concludes, therefore, that Plaintiff has shown a likelihood of success on the merits on her claim under Tenn. Code Ann. § 4-1-407 and that the Court's intervention is necessary to prevent irreparable harm. Given the Court's conclusion that the relevant statutes require a case-by-case consideration of the medical examiner's interest in performing an autopsy in a particular case and a case-by-case determination of whether someone's religious freedom may be violated, the Court concludes that the balance of harms to Defendant is within acceptable limits. Also, there is a public interest in knowing that the courts will afford a person's religious beliefs some weight when legitimate public interests by governmental officials are implicated. The Court concludes, therefore, that Plaintiff's rights are being or will be violated by [Defendant] and [Plaintiff] will suffer immediate and irreparable injury, loss or damage if the Court declines to grant a temporary injunction under the particular circumstances of this case. Tenn. R. Civ. P. 65.04(2).

Based on the foregoing findings of facts and the applicable law, the Chancellor enjoined the Medical Examiner, Dr. Levy, from performing an autopsy and ordered "Defendant [Dr. Levy] to release the body of Cecil C. Johnson to Plaintiff, Sarah Ann Johnson (or to a funeral home or mortician designated by Plaintiff), on December 18, 2009 at 4:00 p.m., absent an Order to the contrary from a state or federal court." The Chancellor also denied the Medical Examiner's motion for a stay, stating that there was no just reason for delay and directed entry of a judgment pursuant to Tenn. R. Civ. P. 54.02. As stated earlier in this opinion, this court granted the Medical Examiner's, Tenn. R. App. P. 7 motion for an emergency stay of the ruling of the Chancery Court pending this appeal. Having reviewed the parties' briefs and considered their oral argument, we now render our opinion in this matter.

ANALYSIS

This is a case of first impression, requiring consideration of Tenn. Code Ann. § 4-1-407, which the Tennessee General Assembly identified in the caption as "an act relative to the preservation of religious freedom." The statute, which became law effective July 1, 2009, reads in part, as follows:

- (c) No government entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is:

- (1) Essential to further a compelling governmental interest; and
- (2) The least restrictive means of furthering that compelling governmental interest.

Tenn. Code Ann. § 4-1-407(c).

The plaintiff, Mrs. Johnson, contends Tennessee’s religious freedom statute imposes a strict scrutiny standard on any governmental action that burdens religious freedom. She further contends that “strict scrutiny,” as that term applies to Tennessee’s Religious Freedom Act, entails a case-by-case, fact specific analysis, pursuant to which the governmental entity has the burden to justify its proposed conduct with respect to the particular litigants at issue under the particular circumstances of that case. Therefore, she contends, the issues presented must be tailored to the unique facts of this case.

The Medical Examiner insists that he has the express statutory authority to perform an autopsy on an executed prisoner set forth in Tennessee Code Annotated § 38-7-106, and contends that the compelling interest to perform an autopsy of Mr. Johnson is to determine the cause and manner of death to ensure that the lethal injection procedure was properly implemented and to assure that it did not cause undue pain and suffering in violation of the Tennessee Constitution’s and the United States Constitution’s prohibition against cruel and unusual punishment.

I.

It is undisputed that the Davidson County Medical Examiner is authorized to perform an autopsy on prisoners executed in Davidson County. This is evident from the fact that the term “executed prisoners” was recently added to Tennessee’s Post-Mortem Examination Act, Tenn. Code Ann. § 38-7-106(a). Our Post-Mortem Act now reads in pertinent part:

A county medical examiner may perform or order an autopsy on the body of any person in a case involving a homicide, suspected homicide, a suicide, a violent, unnatural or suspicious death, an unexpected apparent natural death in an adult, sudden unexpected infant and child deaths, deaths believed to represent a threat to public health or safety, *and executed prisoners*.

Tenn. Code Ann. § 38-7-106(a) (emphasis added).⁴

⁴Subsection (a) further provides:

When the county medical examiner decides to order an autopsy, the county medical
(continued...)

The issue of performing an autopsy on executed prisoners in Tennessee has been a recurring subject of litigation in the United States District Court for the Middle District of Tennessee since 2001. *See Workman v. Levy*, No. 3:01-0296, 2007 WL 1521000 (M.D. Tenn. May 15, 2007); *see also Alley v. Levy*, No. 3:06-0645, 2006 WL 1804605 (M.D. Tenn. June 28, 2006). That litigation, although recent, occurred prior to the 2009 enactment of Tennessee’s religious freedom statute.⁵ Accordingly, we must determine whether the religious freedom statute of 2009 presents a different legal standard than that previously applied by the federal courts by which we examine the statutory right of the Medical Examiner to perform an autopsy of an executed prisoner who objects based on a firmly held religious belief.⁶

For this Court to analyze the issue of whether the Medical Examiner’s interest in performing an autopsy on Mr. Johnson advances a compelling governmental interest, we must determine the level of generality at which the compelling interest is to be defined. In

⁴(...continued)

examiner shall notify the district attorney general and the chief medical examiner. The chief medical examiner or the district attorney general may order an autopsy in such cases on the body of a person in the absence of the county medical examiner or if the county medical examiner has not ordered an autopsy. The district attorney general may order an autopsy in such cases on the body of a person in the absence of the county medical examiner or the failure of the county medical examiner to act. The authority ordering the autopsy shall notify the next of kin about the impending autopsy if the next of kin is known or reasonably ascertainable. The sheriff or other law enforcement agency of the jurisdiction shall serve process containing such notice and return such process within twenty-four (24) hours.

Tenn. Code Ann. § 38-7-106(a).

⁵As Judge Echols noted in the federal action, which preceded the filing of this action in the Chancery Court of Davidson County, Tennessee’s post-mortem statute was amended in a significant manner after Judge Campbell penned his opinion in *Workman* in 2007. Specifically, the General Assembly of Tennessee added “executed prisoners” to the list of persons on whom a county medical examiner may perform or order an autopsy.

⁶In the U.S. District Court action involving these parties, Judge Echols found that Dr. Levy’s application of Tenn. Code Ann. § 38-7-106(a) in this case did not violate the First Amendment. “In this case, there is no indication that the Tennessee law governing autopsies is not neutral, that it is directed against an identifiable suspect class or group, or that it is intended to impinge on anyone’s religious beliefs. Instead, it is a law of general applicability and therefore, Johnson’s First Amendment Rights are not violated by enforcement of that law . . .” *Johnson v. Levy*, No. 3:09-1139, Memorandum at 12 (M.D. Tenn. Dec. 11, 2009). The issue here is not whether the application of Tenn. Code Ann. § 38-7-106(a) violates the First Amendment. The issue is, in light of Tennessee’s recently enacted religious freedom statute, whether the Medical Examiner has established by clear and convincing evidence under the specific facts of this case that performing an autopsy on Mr. Johnson is essential to further a compelling governmental interest.

the context of Tenn. Code Ann. § 4-1-407, we find persuasive the United States Supreme Court opinion in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). *O Centro* involved a challenge by a religious sect to the enforcement of federal drug laws, which infringed on the sect’s ability to drink a hallucinogenic sacramental tea. *Id.* at 423. The suit was brought under the federal Religious Freedom Restoration Act (“RFRA”), which prohibits the federal government from infringing on the free exercise of religion, unless it can survive strict scrutiny review, i.e. whether it can demonstrate that the challenged action represents “the least restrictive means of advancing a compelling interest.” *Id.* (citing 42 U.S.C. § 2000bb-1(b)). The federal government cited to the Controlled Substances Act to establish the compelling governmental interest. *Id.* at 430. The Court rejected this general approach, holding that:

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government’s categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law “to the person” – the particular claimant whose sincere exercise of religion is being substantially burdened.

Id. at 430-31 (citing 42 U.S.C. § 2000bb-1(b)) (emphasis added). The Court then concluded that RFRA required the Government to provide a compelling reason for outlawing the plaintiffs’ limited use of a particular hallucinogen in their sacramental tea and that it had not satisfied the statutory burden of proof. *Id.* at 431-32.

We find *O Centro* instructive because the federal act it interpreted, RFRA, arises out of the same legal environment as Tennessee’s religious freedom statute, Tenn. Code Ann. § 4-1-407.

As was explained in Mrs. Johnson’s brief, for much of the twentieth century the First Amendment right to free exercise of religion was afforded a high level of protection and during that time, a governmental act that threatened the free exercise of religion was required to pass strict scrutiny, if not, the challenged act would be enjoined. *See Sherbert v. Verner*, 374 U.S. 398 (1963). Under the *Sherbert* standard, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *Id.*

The legal landscape pertaining to restraints against the free exercise of religion changed significantly in 1990, with the United States Supreme Court decision in *Employment Division, Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). *Employment Division* superseded *Sherbert* with the holding that “religion-neutral” laws of general applicability could burden free exercise without special justification. 494 U.S. at 879-80. Prior to *Employment Division*, a challenged governmental action was required to pass the

strictest scrutiny. After *Employment Division*, general laws were merely subjected to a rational basis review. As stated in her brief: “Insofar as this shift threatened to permit governments to bulldoze religious freedoms for little or no governmental benefit, *Employment Division* produced a significant public outcry.”

Following *Employment Division*, and apparently because of a public outcry, the United States Congress enacted a comprehensive statute, the Religious Freedom Restoration Act, providing that no governmental agency could burden the free exercise of religion without extraordinary justification, essentially restoring the *Sherbert* standard.

RFRA expressly applied to the federal government; its application to state governmental entities, however, was successfully challenged in *City of Boerne v. Flores*, 521 U.S. 507 (1997). As a consequence, RFRA remained in effect as applied to the federal government but it did not apply to the fifty states. Thereafter, the Tennessee General Assembly enacted a statute substantially similar to RFRA. *See* Tenn. Code Ann. § 4-1-407 (2009). The legislative history of Tennessee’s religious freedom statute reveals that the purpose in enacting the statute was to mirror RFRA for the purpose of restoring heightened free exercise protections. This is abundantly evident from the fact that RFRA and Tenn. Code Ann. § 4-1-407 are substantially similar. In pertinent part, the federal RFRA provides:

- (a) In general.
Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
- (b) Exception.
Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person –
 - (1) is in furtherance of a compelling governmental interest;
 - and
 - (2) is the least restrictive means of furthering that interest.

42 U.S.C. § 2000bb-1(a)-(b).

Tennessee’s religious freedom statute provides:

- (b) Except as provided in subsection (c), no government entity shall substantially burden a person’s free exercise of religion even if

the burden results from a rule of general applicability.

- (c) No government entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is:
 - (1) essential to further a compelling governmental interest;
and
 - (2) the least restrictive means of furthering that compelling governmental interest.

Tenn. Code Ann. § 4-1-407(b)-(c).

Considering the substantial similarity of the two statutory schemes, it is readily apparent that the Tennessee General Assembly enacted a statute parallel to the federal RFRA to ensure that no governmental agency could burden the exercise of religion in Tennessee without the requisite justification.

There are two differences, however, that are relevant to the issue here, each of which pertains to the burden of proof on the State of Tennessee and its agencies. One is the statutory definition of the term “demonstrates.” Under the federal RFRA, “demonstrates” is defined to mean: “meets the burdens of going forward with the evidence and of persuasion.” 42 U.S.C. § 2000bb-2(3). In federal court, unless otherwise specified, the burden of persuasion in a civil suit is proof by a preponderance of the evidence. *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel*, 177 F. 3d 491, 502 (6th Cir. 1999) (citing 2 MCCORMICK ON EVIDENCE § 340, (John William Strong ed., 4th ed. 1992)). Conversely, the Tennessee Act defines “demonstrates” to mean: “meets the burdens of going forward with the evidence and of persuasion under the standard of *clear and convincing evidence*.” Tenn. Code Ann. § 4-1-407(a)(1)(emphasis added).

To satisfy Tennessee's clear and convincing standard the evidence must establish that the truth of the facts asserted is highly probable, *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005), and that it eliminates any serious or substantial doubt about the correctness of the conclusions drawn from that evidence. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In re J.J.C.*, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). To constitute clear and convincing evidence, it must produce in the fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. 2001); *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002). Therefore, Tennessee's religious freedom statute places a significantly heightened burden of proof on the governmental entity.

The second difference is that in order to satisfy strict scrutiny under RFRA, the federal government must demonstrate that the proposed action is “*in furtherance* of a compelling governmental interest.” 42 U.S.C. § 2000bb-1(b)(1) (emphasis added). By contrast, in Tennessee the governmental agency must prove that its proposed course of action is “*essential* to further a compelling governmental interest.” Tenn. Code Ann. § 4-1-407(c)(1) (emphasis added). The distinction between “in furtherance” and “essential” is more than semantics; it reveals that the Tennessee General Assembly intended to provide greater protection of religious freedom than that afforded by the federal RFRA. Under Tennessee’s religious freedom statute, the governmental agency has to prove by clear and convincing evidence that the action it seeks to take is essential to furthering that compelling governmental interest. *See* Tenn. Code Ann. § 4-1-407(c)(1).

Pursuant to the legislative mandate in Tennessee’s religious freedom statute and in consideration of the rational in *O Centro*, we have concluded that the Davidson County Medical Examiner must establish by clear and convincing evidence under the specific facts of this case that performing an autopsy on Mr. Johnson is essential to further a compelling governmental interest.⁷

II.

The Medical Examiner states that the execution of a prisoner is one of the most serious actions performed by the State of Tennessee and that there is a compelling governmental interest in having the Medical Examiner act as an independent investigator of the execution, to confirm the manner and cause of death, to assure there is no violation of the right against cruel and unusual punishment, and to be certain that the execution is free from any real or perceived irregularities.

Dr. Levy testified to identify the kind of information he would be seeking in this case. As he explained:

In this case, . . . like in many of the homicides we deal with, the cause of death

⁷The Medical Examiner asserts that the plaintiff does not have a legal right to enjoin him from exercising his discretion to conduct an autopsy. We find this assertion without merit in light of the specific legal right asserted by the plaintiff in this case. Generally, an injunction or writ of mandamus “will not lie to control official judgment or discretion, but it is the proper remedy where the proven facts show a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and [the complainant] has no other specific or adequate remedy.” *State ex rel. Ragsdale v. Sandefur*, 389 S.W.2d 266, 269 (Tenn. 1965) (citing *State, ex rel. Motlow v. Clark*, 114 S.W.2d 800 (Tenn. 1938); *State v. Wilbur*, 47 S.W. 411 (Tenn. 1898); *Lynn v. Polk*, 76 Tenn. 121 (1881); *Peerless Const. Co. v. Bass*, 14 S.W.2d 732 (Tenn. 1929); *Taylor v. Waddey*, 334 S.W.2d 733 (Tenn. 1960); *State ex rel. Nashville Pure Milk v. Town of Shelbyville*, 240 S.W.2d 239 (Tenn. 1951); *Lamb v. State*, 338 S.W.2d 584 (Tenn. 1960).

appears to be obvious – in this case, from the application of a lethal injection. That lethal injection was caused by the use of three different medications. There have been serious questions raised, both in the legal and scientific and medical communities, as to whether this is indeed effective, whether the first medication or drug that is administered, thiopental, is actually rendering the inmate unconscious, whether or not the inmate is suffering conscious pain and suffering from the application of the other two drugs is part of the execution process as a result. And these issues clearly need to be resolved, because it goes to what I would call some of the most important rights that we have as citizens of this country, and we need to basically ensure that these drug levels are what they should be. Further, we need to document whether or not there were any other issues involved with the execution. Were the intravenous needle sticks in appropriate locations; was there – and there have been issues in other states where that issue has come up, as to whether or not the intravenous was inserted properly. We also need to document were there any other injuries on the body that we may not have been aware of. And just because you don't see a bruise or a mark on the outside doesn't mean that there isn't an injury internally. It goes back to, again, you need to look and see.

For her part, Mrs. Johnson contends the Medical Examiner does not have a compelling interest to conduct an autopsy of executed prisoners generally, and on her husband in particular. First, she notes that the statute that grants the Medical Examiner the authority to conduct an autopsy of executed prisoners is discretionary, not mandatory. *See* Tenn. Code Ann. § 38-7-106(a). As she correctly asserts, the statute permits, but does not require, an autopsy in the case of executed inmates. Tenn. Code Ann. § 38-7-106(a) (2008) (“A county medical examiner *may* perform or order an autopsy on the body of . . . executed prisoners.”) (emphasis added). Secondly, Mrs. Johnson notes that Tennessee’s Execution Protocol, which mandates comprehensive safeguards for a properly conducted execution by lethal injection, does not recommend an autopsy of an executed prisoner. For these reasons, she insists that if an autopsy of executed prisoners was essential to further a compelling interest of the State of Tennessee, or any of its governmental entities or agencies, the Post-Mortem Act would mandate the performance of an autopsy on each and every executed prisoner or the policy regarding the execution of condemned prisoners would recommend an autopsy be performed on executed prisoners.

Mrs. Johnson also asserts that she and her now deceased husband are not representatives of a group and Mr. Johnson’s claims are not synonymous with the claims of other executed prisoners or others who may oppose autopsy on religious grounds. As she insists, the facts of this case are unique in a number of respects, including the undisputed sincerity of Mr. Johnson’s religious beliefs, the fact that Mr. Johnson never challenged

Tennessee's lethal injection protocol, and the unchallenged empirical evidence that Mr. Johnson died, without incident, from lethal injection performed according to Tennessee's protocol.

We find it significant that there is not a scintilla of evidence in this record that Mr. Johnson died of any cause other than lethal injection pursuant to Tennessee's detailed lethal injection protocol. The Warden testified that the execution was conducted strictly in accordance with the protocol, and there is no evidence to the contrary. The Warden also testified that Mr. Johnson died peacefully, that he began to snore shortly after the injection process began, and that he died without incident. Several impartial persons witnessed the execution and none of them have suggested there were any problems with the execution. There is no evidence or suggestion of any wrongdoing in connection with the execution. Neither Mr. or Mrs. Johnson have ever challenged the legality of the lethal injection protocol. Moreover, both Mr. and Mrs. Johnson consented to the taking and testing of bodily fluids so long as the body was not cut open. Furthermore, the Medical Examiner has admitted that his office has not initiated any investigation or inquiry of any kind into this matter. Moreover, he admitted that he has not made any inquiries, that no one on his behalf or on behalf of his office has made any inquiries, and that no one has been interviewed to determine whether there is any reason particular to Cecil Johnson that necessitates an autopsy.

We also find it significant that since 2001, five prisoners prior to Mr. Johnson were executed in Tennessee pursuant to the same lethal injection protocol and the Davidson County Medical Examiner performed an autopsy on four of the five executed prisoners.⁸ None of the autopsies suggested any improprieties or conflict with the prohibition against cruel and unusual treatment as proscribed by the Tennessee or United States Constitution.⁹ Furthermore, we note that an autopsy was not done on Sedley Alley, an executed prisoner, at the request of his family; instead, the Medical Examiner merely fluids.

III.

We have determined that a compelling interest exists for conducting some type of examination of every inmate who is executed and investigating the circumstances of the execution. Depending on the circumstances, the examination and investigation may include an autopsy. The compelling interest is grounded in the prohibition against cruel and unusual punishment found in Article I, Section 16 of the Tennessee Constitution. The prohibition against cruel and unusual punishment represents a basic societal value held by Tennesseans

⁸Robert Glen Coe, Sedley Alley, Philip Workman, Daryl Holton, and Steve Henley.

⁹In one of the autopsies, a trace of marijuana was found but it had no bearing on the propriety of the lethal injection protocol.

for over 200 years and its importance is shown by the fact of its inclusion in the Tennessee Constitution from the inception of the State. *See* Tenn. Const., art. XI, § 16 (1796). While an individual is not guaranteed a pain-free execution, *See Baze v. Rees*, 128 S.Ct. 1520, 1530 (2008) (plurality opinion), the Tennessee Constitution prohibits punishments, including executions, that amount to torture, lingering death or wanton infliction of pain. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 306 (Tenn. 2005). The obligation under Article I, Sec. 16 runs not only to the person executed, but to those who may be executed in the future. If the Medical Examiner determines, in his discretion, that an autopsy helps ensure that the State is fulfilling its obligations to those sentenced to death, then under most circumstances his decision will prevail. In this instance, however, the need for an autopsy was challenged pursuant to Tennessee's religious freedom statute, Tenn. Code Ann. § 4-1-407(c)(1), and the Medical Examiner failed to satisfy the burden of proof required by the statute, that is he failed to prove that an autopsy on Mr. Johnson was essential to further the government's compelling interest. We, therefore, affirm the ruling of the Chancery Court.

Further, the Court's ruling is a narrow one based on the unique circumstances of this case. It should not be read as an outright prohibition against autopsies where an inmate has a sincerely held religious belief against an autopsy. There may be circumstances when an autopsy is essential to further the government's compelling interest and, therefore, overrides the executed prisoner's religious belief, such as when facts exist to indicate that the execution was not without incident, the inmate did not react to the drugs as expected, and/or when an autopsy becomes essential to understanding the event. Those circumstances, of course, will require proof satisfying the requirements of Tenn. Code Ann. § 4-1-407(c)(1). Even then, the autopsy must be restricted to procedures and tests that are necessary to understand what happened. *See* Tenn. Code Ann. § 4-1-407(c)(2). Each case must turn on its own peculiar facts.

IV.

The Attorney General for the State of Tennessee made a brief appearance in this appeal on behalf of Dr. Bruce Levy for the limited purpose of seeking the dismissal of Dr. Bruce Levy in his official capacity as the Chief Medical Examiner of the State of Tennessee. Considering the fact that Dr. Bruce Levy is the Medical Examiner for Davidson County and the Chief Medical Examiner for the State of Tennessee, and that Dr. Levy is an indispensable party because he is the medical examiner who desires to conduct an autopsy on Mr. Johnson, we find no just cause to dismiss Dr. Bruce Levy in his capacity as the Chief Medical Examiner.

V.

On December 18, 2009, this Court entered an Order that stayed the ruling of the Chancery Court pending the disposition of this appeal. Because we have disposed of this

appeal and ruled in favor of the plaintiff, the stay implemented pursuant to the order entered by this Court on December 18, 2009 is to be lifted pursuant to the specific directive stated in a separate order entered concurrent with this opinion.¹⁰

IN CONCLUSION

The judgment of the Chancery Court for Davidson County, Tennessee is affirmed. This matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the Davidson County Medical Examiner.

FRANK G. CLEMENT, JR., JUDGE

¹⁰When the Chancery Court made its ruling, Mr. Johnson had been dead 15 days. At the time of the oral argument, Mr. Johnson had been dead for 37 days, and he had been dead 43 days when this opinion was filed; yet, the legal dispute regarding an autopsy remains. Extended delays in the performance of an essential autopsy and extended delays in turning over a body to the family for a proper burial is a disturbing by-product of litigation that is commenced at the time of an execution. Under Tenn. Code Ann. § 38-7-106(a), the authority ordering the autopsy must notify the next of kin about the impending autopsy, although consent of the next of kin is not required. The minimum notice is twenty-four hours. Tenn. Code Ann. § 38-7-106(a). In order to avoid eleventh-hour filings which delay or undermine the efficacy of an essential autopsy, and to allow thorough consideration of the merits of each case, the Tennessee General Assembly may wish to consider legislation that permits that an earlier notice be given to condemned inmates awaiting execution, without prejudice to the discretion of the authority ordering the autopsy to make such a determination and give notice following the execution. In such circumstances an eleventh-hour filing to stop or delay an autopsy could be viewed as an undue delay and relief denied. *See Arthur v. Allen*, 574 F. Supp.2d 1252, 1256-57 (S.D. Ala. 2008).